No. 96-1276

In the Supreme Court of the United States

OCTOBER TERM, 1996

GARY L. BRADLEY, ET AL., PETITIONERS

v.

FIRST GIBRALTAR BANK, FSB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below had subject-matter jurisdiction over this case, which the Federal Deposit Insurance Corporation removed to federal court after it intervened in the original state court action.

2. Whether the courts below properly held petitioners liable for the amounts due on loans made to them by a failed thrift.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unpublished, but the judgment is noted at 98 F.3d 1338 (Table). The opinion and order of the district court (Pet. App. A19-A30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1996. A petition for rehearing was denied on November 12, 1996. Pet. App. A18. The petition for a writ of certiorari was filed on February 7,

1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioners entered into several loan agreements with Gibraltar Savings Association (Gibraltar) to fund the proposed development of a planned community near Austin, Texas. Pet. App. A2. Gibraltar eventually advanced nearly $80 million to petitioner Circle C Development Corporation (Circle C) under four promissory notes. Petitioners Bradley and Gressett, who were Circle C's principal shareholders, guaranteed 20% of the corporation's debt and personally borrowed an additional $15 million from Gibraltar under a separate note (the Personal Note). *Ibid.*; Pet. 4. The various notes contained cross-default provisions under which a default on any note would be a default on each of the remaining notes as well. Pet. App. A2.

Petitioners Bradley and Gressett failed to pay the interest due on the Personal Note in May 1988. Pet. App. A2. When petitioners failed to cure the default, Gibraltar accelerated the balance of the note and called for immediate payment. *Ibid.* Petitioners then "restructured" their investment in Circle C, raising more than $1 million in new cash and transferring all of the corporation's interests in the development project to a new entity, Circle C Development Joint Venture (Joint Venture). *Id.* at A3. Joint Venture later released all claims related to the notes as part of a bankruptcy reorganization. *Id.* at A12-A13, A22.

Petitioners Bradley and Gressett also negotiated a "work-out" agreement under which Gibraltar rescinded its declaration of default and acceleration and petitioners reaffirmed their obligations under the

Personal Note. Pet. App. A3. In the agreement, petitioners also waived any "offsets, claims, defenses or counterclaims" they might have had with respect to that note or to their guarantees. *Id.* at A14. On December 1, 1988, petitioners again failed to pay the interest due on the Personal Note, thus causing a default on all of the notes under the cross-default provisions. *Id.* at A3.

2. On December 27, 1988, the Federal Home Loan Bank Board closed Gibraltar and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) to act as its receiver. Pet. App. A3. The FSLIC transferred many of Gibraltar's assets, including the notes and guarantees involved in this case, to respondent First Gibraltar Bank (FGB).[1] Under the acquisition agreement, the receiver retained virtually all of Gibraltar's unsecured liabilities, including any obligation to provide further funds for the Circle C development project. *Id.* at A3-A4.

Petitioners repeatedly sought additional funding from FGB, which denied any obligation to provide it. Pet. App. A4. To protect its collateral, FGB did advance more than $5 million in new funds in the first half of 1989, after petitioners acknowledged that the advances were not a ratification or assumption of any funding obligation owed by Gibraltar. Following an unfavorable appraisal, however, FGB refused to provide additional funds unless petitioners confirmed in writing that they had no claims against FGB and

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[1] FGB, the nominal respondent in this case, was actually the corporate successor to First Texas Bank, the original transferee of the notes. FGB in turn became First Madison Bank, and is now known as First Nationwide Bank. See Pet. App. A3 n.3, A20.

waived any potential claims. Petitioners signed 27 letter agreements to that effect in 1989 and 1990. *Ibid.*

3. In September 1990, FGB filed suit in Texas state court seeking recovery of funds advanced under the various notes. Pet. App. A4. Petitioners asserted various counterclaims, including fraud, breach of contract and fiduciary duty, and tortious interference with contract. *Ibid.* Some of petitioners' allegations were directed at Gibraltar and the FSLIC. *Id.* at A9-A10.[2] Petitioners also argued that Gibraltar's insolvency and the appointment of the FSLIC as receiver amounted to a repudiation of the debt, and that FGB had assumed Gibraltar's funding obligations when it received Gibraltar's assets from the FSLIC. *Id.* at A5.

FGB filed two summary judgment motions, each of which was denied. In November 1992, the state court ruled that a trial would be required to resolve certain factual issues, including whether the notes and guarantees at issue were owned by FGB or by the Federal Deposit Insurance Corporation (FDIC), which had

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[2] Petitioners contended, for example, that:

> In order for [petitioners] to be able to meet their obligations under the various loan agreements at issue in this case, [FGB] and/or Gibraltar Savings, and/or the FSLIC were obligated to fulfill their obligations under these same loan agreements.

Pet. App. A10. Similarly, petitioners claimed they were excused from performance under the loan agreements "by the breach of Gibraltar savings of its duty of good faith and fair dealing owed to [petitioners]." *Ibid.*

succeeded the FSLIC as Gibraltar's receiver. Pet. App. A5, A7.[3]

4. In August 1993, the FDIC (as receiver) intervened in the state court proceeding, in order to protect any of its interests that might be implicated by the litigation. Pet. App. A5. In particular, the FDIC sought a declaration that its predecessor, the FSLIC, had had the authority, as receiver, to assign Gibraltar's assets to FGB free of Gibraltar's unsecured liabilities. See *id.* at A5 n.4. On the same day, the FDIC exercised its right under 12 U.S.C. 1819(b)(2) to remove the case to federal court. *Ibid.*

The FDIC and FGB both moved for summary judgment. Pet. App. A5. In particular, the FDIC asked the district court to rule on the limited legal issues that were the basis for its intervention. See *id.* at A23. Petitioners asked the court to strike the FDIC's intervention and remand the case to state court. *Ibid.*

The district court granted summary judgment for FGB. Pet. App. A19-A25. The court held that petitioners had no standing to assert claims against FGB (*id.* at A22); that FGB had not succeeded to any liabilities of Gibraltar when it acquired petitioners' notes from the FSLIC as receiver (*id.* at A21-A22); that any obligation Gibraltar might have had to advance funds had been either waived by petitioners in their work-out agreement or cut off by petitioners' own default on the notes (*id.* at A21); and that the defenses and counterclaims petitioners sought to

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[3] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, abolished the FSLIC and provided for the FDIC's succession to the FSLIC's function as receiver of failed thrifts.

assert against FGB had similarly been waived and were, in any event, without merit (*id.* at A22-A23). The court denied petitioners' motions to strike the FDIC's intervention and remand the case. *Id.* at A30. The court criticized the FDIC, however, for intervening "unnecessarily," holding laconically that "[t]he FDIC seeks an anticipatory declaratory judgment that it should not be part of this dispute, and the FDIC is correct, it should not be involved." *Id.* at A23.

5. The court of appeals affirmed. Pet. App. A1-A17. The court first considered and rejected (*id.* at A6-A11) petitioners' arguments that federal jurisdiction was lacking because the FDIC was not a proper party to the litigation. The court noted (*id.* at A7) that the FDIC had involved itself in the action only after a ruling by the state court that "appeared to set for trial the issue whether the FDIC still owned" the notes involved in the litigation—an issue that was "sufficient to warrant the agency's intervention." Thus, "the FDIC was entitled to be a party in this case; the case was properly removed, and * * * because federal jurisdiction is assessed at the time of removal, the district court's ultimate dismissal of the FDIC did not affect the court's subject matter jurisdiction." *Id.* at A11.

The court found "more interesting" (Pet. App. A8) the question whether that "ultimate dismissal" (*id.* at A11) was proper. After explaining at some length (*id.* at A8-A11) the FDIC's "concrete financial interest in the litigation" (*id.* at A8) and the propriety of its intervention to defend against claims and defenses involving alleged actions or omissions by Gibraltar or its receiver, the court nonetheless affirmed the dismissal (*id.* at A11). The court made clear, however,

that it "disagree[d] with the district court's reason[ing]," and it affirmed dismissal "not because the agency's participation was 'unnecessary,'" as the district court had thought, "but because, after the district court decided to grant summary judgment for FGB, any threat to FDIC's interests terminated." *Ibid.*

The court proceeded to affirm the grant of summary judgment in favor of FGB. Pet. App. A12-A17. Although it agreed with the district court that petitioner Circle C lacked any standing and that petitioners Bradley and Gressett lacked standing as shareholders and principals of the corporation, the court held that Bradley and Gressett did have standing as guarantors to assert any defenses that would have been available to Circle C as borrower. *Id.* at A12-A13. The court further held, however, that petitioners had waived all of the claims and defenses they now sought to assert, either in the work-out agreement signed in November 1988 or, as against FGB, in the 27 letter agreements signed in connection with FGB's advance of further funds after it acquired petitioners' notes. *Id.* at A13-A17.

ARGUMENT

1. We note, at the outset, that on August 19, 1996, after argument in the court of appeals but before that court had rendered its decision, the FDIC, acting in its corporate capacity (rather than as receiver), acquired from FGB's corporate successor the notes and guarantees at issue in this case. That transaction is not, of course, legally relevant to the question whether there was a proper basis for federal jurisdiction at the time this case was removed from state court. The Court should be aware, however, that re-

spondent FGB (now First Nationwide Bank, see note 1, *supra*) would appear to have no continuing interest in this case. Cf. Sup. Ct. Rules 12.6, 35. If this case proceeds, the FDIC will likely file a motion to substitute itself, in its corporate capacity, for FGB as respondent.

2. Petitioners contend principally (Pet. 7-25) that the federal courts below had no jurisdiction over this matter because the FDIC, as receiver for Gibraltar, never had an interest in the litigation sufficient to satisfy the requirements of Article III of the Constitution. That is incorrect.

The court of appeals noted (Pet. App. A7) that the FDIC intervened in this case only after the state trial court in which it was pending issued an order that "appeared to set for trial the issue whether the FDIC still owned" the notes and guarantees at issue. The court correctly held that that issue alone was "sufficient to warrant the agency's intervention." *Ibid.* In addition, the court properly recognized that (i) petitioners' claims "attack[ing] the actions of Gibraltar," and therefore raising issues of potential liability on the part of the FDIC as Gibraltar's receiver, and (ii) the FDIC's guarantee, in its assistance agreement with FGB, that FGB would realize a given rate of return on the notes, also gave the FDIC "a concrete financial interest in the litigation that would justify its status as a party." *Id.* at A8.[4] Those

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[4] See also *Nutro Prods. Corp.* v. *NCNB Texas Nat'l Bank*, 35 F.3d 1021, 1023 (5th Cir. 1994) (where claims involving a failed bank are brought after assignment of the bank's assets, the FDIC as receiver is a "proper party" entitled to intervene); *Bank One Texas Nat'l Ass'n* v. *Morrison*, 26 F.3d 544, 547 (5th Cir. 1994); *Pernie Bailey Drilling Co.* v. *FDIC*, 905 F.2d 78, 80 (5th Cir. 1990).

adverse interests, put at issue by petitioners through their litigation with FGB and existing at the time of removal to federal court, plainly gave rise to a sufficient "case or controversy" to satisfy the requirements of federal jurisdiction under Article III.

3. Because the FDIC was a proper party to the litigation under Article III, petitioners' further arguments concerning jurisdiction (Pet. 10-14, 18-25) are beside the point. Thus, whether an intervenor that does *not* itself satisfy the requirements for constitutional standing should ever be permitted to intervene in a federal case (see Pet. 10-14) is not at issue here.

Similarly, petitioners' arguments (Pet. 18-25) concerning the applicability and constitutionality of 12 U.S.C. 1819 are inapposite, because they depend on the incorrect premise (Pet. 19; see Pet. 24-25) that the courts in this case allowed the FDIC to "evade" a statutory or constitutional requirement "that the FDIC be a [proper] party." In a case in which the FDIC was otherwise a constitutionally proper party to the litigation, Section 1819(b)(2)(A) provides a sufficient basis to treat the case as one "arising under" federal law and to remove it to federal court.[5] See, *e.g.*, *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 264 (1992) ("Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations."); *Mizuna, Ltd.* v. *Crossland Fed. Sav. Bank*, 90 F.3d 650, 654-657 (2d Cir. 1996); *Buchner* v. *FDIC*, 981 F.2d 816, 818-819

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[5] Section 1819(b)(2)(A) provides that "all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States." 12 U.S.C. 1819(b)(2)(A).

(5th Cir. 1993); *FDIC* v. *Meyerland Co.*, 960 F.2d 512, 517-519 (5th Cir. 1992) (en banc), cert. denied, 506 U.S. 1049 (1993); see also *Brockman* v. *Merabank*, 40 F.3d 1013, 1017-1018 (9th Cir. 1994) (no constitutional defect in parallel provision applicable to the Resolution Trust Corporation).

Finally, there is no basis for petitioners' apparent contention (see Pet. 20-24) that the FDIC was somehow constitutionally required to satisfy the requirements of Federal Rule of Civil Procedure 24, which governs the procedural requirements for intervention in cases pending in federal court. It is undisputed that the FDIC's original intervention in the state court case was procedurally proper under Texas law (see Pet. App. A6-A7), and that the FDIC correctly invoked the procedural mechanisms for removal to federal court. In the federal courts, petitioners have been afforded ample opportunity to advance their arguments concerning the FDIC's lack of constitutional standing. There is no merit to petitioners' contention that the courts below should also have considered the requirements of inapplicable federal procedural rules.[6]

4. Petitioners argue (Pet. 25-26) that the court of appeals' decision conflicts with this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). The court of appeals, however, like the district court (Pet. App. A21-A23), simply construed the releases and waivers that petitioners signed at various times

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[6] At any rate, the FDIC-Receiver meets all of the criteria for intervention under Rule 24(a)(2). See *Arends* v. *Eurobank & Trust Co.*, 146 F.R.D. 42, 48 (D.P.R. 1993) (FDIC interests evident); *Diaz* v. *McAllen State Bank*, 975 F.2d 1145, 1148 (5th Cir. 1992) (Congress clearly provided FDIC right and time to intervene).

and concluded (*id.* at A16) that petitioners had "waived not only all of their claims [including offsets] prior to November 3, 1988, but also [all] their claims against FGB," the party they sued in this proceeding.[7] Contrary to petitioners' contention (Pet. 26), that conclusion does not rely on any "special federal common law rule." The lower courts' resolution of petitioners' claims and defenses concerning liability for the money they borrowed from Gibraltar reflects only the application of routine principles of contract law to particular documents, and nothing in the decisions below merits further review by this Court.

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[7] Even if petitioners were correct that they should have been allowed to assert against any subsequent holder of their notes defenses based on Gibraltar's alleged failure to advance funds as originally agreed (see Pet. 26), and that they did not waive such defenses in their letter agreements with FGB (see Pet. 25), they would have no remaining claim in this case. Both the individual petitioners (see Pet. App. A14) and their corporation (*id.* at A22) waived any offsets or defenses to liability that might have arisen prior to the signing of the work-out agreement on November 3, 1988. After December 1, 1988, when petitioners again defaulted on their notes, Gibraltar had no possible obligation to continue to advance funds. *Id.* at A21; see also *id.* at A16 (petitioners have waived all claims "except during the period from November 4, 1988 to December 28, 1988," when Gibraltar failed and FGB acquired the notes). Yet petitioners nowhere dispute the district court's finding (*id.* at A21) that they "can show no default by Gibraltar between the reinstatement agreement [on November 3, 1988] and [Gibraltar's] collapse." There remains no valid defense to liability on the notes that petitioners could assert against any party in any litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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